NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	
RACHEL ANN KOZLOFF,	:	No. 474 WDA 2013
	:	
Appellant	:	

Appeal from the Judgment of Sentence, January 29, 2013,
in the Court of Common Pleas of Erie County
Criminal Division at No. CP-25-CR-0001849-2012

BEFORE: FORD ELLIOTT, P.J.E., BOWES AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: FILED: April 22, 2014

Appellant appeals the judgment of sentence imposed on appellant following her conviction for the murder of her boyfriend. Finding no merit in the issues raised on appeal, we will affirm the judgment of sentence.

On April 12, 2012, appellant shot her boyfriend, Michael Henry, at his residence in Erie. Henry was a large man, standing 6'5" and weighing 285 pounds. Appellant is 5'4" and weighs 155 pounds. Henry was also a member of the Iron Wings motorcycle gang and had a reputation for physical violence. As her defense at trial, appellant conceded that she shot Henry, but contended that he was continually physically abusive toward her during their relationship, and at the time of his killing, he was savagely attacking her while she was trying to escape his residence. Appellant shot Henry five times.

The Commonwealth, in its case in chief, presented evidence that appellant believed Henry was seeing other women and wished to break off their relationship. The Commonwealth also presented evidence that Henry was seated on a futon when he was shot, and not attacking appellant.

On December 7, 2012, the jury convicted appellant of third degree murder, recklessly endangering another person, and possessing an instrument of crime.[1] On January 29, 2013, the court sentenced appellant to an aggregate term of 18 to 40 years' imprisonment. This timely appeal followed.

Appellant raises the following issues on appeal:

> A. Whether the trial court erred in denying the appellant's motion to suppress and allowing the appellant's second interview with the City of Erie Police Department to be presented at trial where the appellant's statement was involuntary and taken under false pretenses?
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> B. Whether the appellant is entitled to a new trial based upon the assertion that the evidence presented at trial is insufficient to support the verdict of third degree murder?
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> C. Whether the appellant's sentence is manifestly excessive, clearly unreasonable and inconsistent with the objectives of the Pennsylvania Sentencing Code?

Appellant's brief at 4.

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[1] 18 Pa.C.S.A. §§ 2502(c), 2705, and 907, respectively.

Appellant first claims that her motion to suppress was improperly denied. Prior to trial, appellant filed a motion to suppress her two statements to the police. On appeal, she questions the propriety of admitting only her second statement, which she claims was involuntary and taken under false pretenses.

> When reviewing a challenge to a trial court's denial of a suppression motion, our standard of review is:
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> > limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, we are bound by these findings and may reverse only if the court's legal conclusions are erroneous. Where, as here, the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of law of the courts below are subject to our plenary review.

Commonwealth v. Delvalle, 74 A.3d 1081, 1084 (Pa.Super. 2013), quoting ***Commonwealth v. Hoppert***, 39 A.3d 358, 361-362 (Pa.Super. 2012), ***appeal denied***, 618 Pa. 684, 57 A.3d 68 (2012).

We find that appellant's second statement to police was neither involuntary, nor taken under false pretenses, nor was there any other basis for suppressing it. Even if appellant's second interview is viewed as custodial in nature, prior to her second statement, appellant was read her ***Miranda*** rights and then signed a valid waiver of those rights.[2] (Notes of testimony, 9/7/12 at 22, 24-25.) Thus, her statement was manifestly voluntary and admissible.

Appellant argues, however, that her waiver was given under false pretenses based upon the following exchange between her and Detective Julie Kemling:

> Q. Having your [***Miranda***] rights in mind, do you wish to talk to me now?
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> A. Depends. Are you guys charging me?
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> Q. Well, we're still in the investigation phase. Everybody who had contact with him in this area, I am going to tell you that since you were around in that time frame, everybody is considered a suspect. My job is to eliminate people, and find who is ultimately responsible for this.

Appellant's brief at 17.

Appellant characterizes Kemling's response as deceptive and vague because she asked if she was going to be charged and Kemling did not answer affirmatively, but appellant was nonetheless charged with homicide immediately after the interview. We disagree with that characterization.

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[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Appellant asked if she was being charged, and Kemling candidly admitted that appellant was still a suspect. Obviously, depending upon appellant's subsequent statement, that suspicion could ripen into an arrest, but Kemling did not know what appellant's statement would be when Kemling answered appellant's question. We see no attempt to trick appellant.

Appellant argues that the detective's response was misleading because it was the intent of the police all along to arrest appellant after the second interview as evidenced by the fact that no new information came to light during the second interview. However, Kemling testified at the suppression hearing as to the matters she needed to clarify with appellant during the second interview. Between the first and second interviews, Kemling spoke to Josie Noble, a woman with whom appellant suspected Henry was cheating. (Notes of testimony, 9/7/12 at 49-50.) Noble characterized a telephone call she had received from appellant as loud and accusatory rather than calm as appellant had described it in the first interview. Since the first interview, Kemling also had seen a video of the exterior of Henry's residence on the night of the murder. (***Id.*** at 30, 50.) Appellant appeared in the video in different clothing than she had on when she came to the police station later that night. (***Id.*** at 43, 50.) From that same video, Kemling also noted discrepancies between the first interview and the video as to where and when appellant was coming to and going from Henry's residence

on that night. (***Id.*** at 35-37, 50.) Finally, Kemling wanted to ask appellant about a door at Henry's residence that she may have stated as having used during the first interview, but which police later discovered was padlocked and inoperable. (***Id.*** at 37.) Clearly, appellant's answers to these discrepancies during the second interview ripened police suspicion enough that they decided to arrest her.[3]

In sum, we find that appellant voluntarily waived her ***Miranda*** rights and did not do so on the basis of any purported subterfuge by police. Consequently, there was no basis to suppress the evidence uncovered by the second interview and the court properly did not do so.

In her second issue, appellant argues that the evidence was insufficient to support her conviction for third degree murder.

> Our standard of review regarding challenges to the sufficiency of the evidence is well-settled:
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> > We must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of

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[3] Although it was not mentioned at the suppression hearing, at trial Kemling described yet another major inconsistency she wanted to ask appellant about at the second interview. Kemling noted that at the first interview, appellant exhibited a significant limp which she attributed to Henry throwing her down the stairs. However, since the first interview, Kemling had seen a video from a convenience store made on the night of the murder which showed appellant with no visible limp. (Notes of testimony, 12/5/12 at 9-10.)

> fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.
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> The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

Commonwealth v. Olsen, 82 A.3d 1041, 1046 (Pa.Super. 2013), quoting ***Commonwealth v. Mobley***, 14 A.3d 887, 889-890 (Pa.Super. 2011).

Instantly, appellant argues that the Commonwealth failed to present sufficient evidence as to the element of malice. "To the contrary, what the Commonwealth's evidence showed, was the Appellant as the victim of a manipulative and abusive relationship riddled with unusual sexual behavior that often resulted in rape, rampant drug use and physical violence." (Appellant's brief at 19.) Appellant then supports this assertion almost entirely with citations to her own self-serving testimony. Appellant is not reviewing the Commonwealth's evidence at all and is improperly viewing the evidence in the light most favorable to herself and not the Commonwealth as

verdict winner. This issue is actually easy to resolve in the Commonwealth's favor.

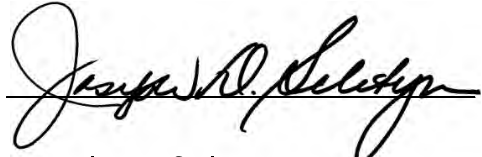
"It is well settled that the Commonwealth may prove malice and specific intent to kill by means of wholly circumstantial evidence, including the use of a deadly weapon on a vital part of the victim's body." ***Commonwealth v. Parrish***, ___ Pa. ___, ___, 77 A.3d 557, 561 (2013). At trial, the Commonwealth presented the testimony of the forensic pathologist who performed the victim's autopsy. This witness testified that appellant's second shot went through the victim's ear and then beneath the scalp, without penetrating the skull, and then subsequently exiting the scalp. (Notes of testimony, 12/5/12 at 126.) Although this shot was not the lethal wound, appellant plainly aimed her gun, a deadly weapon, at the victim's head, a vital part of his body, and then shot him in the head. This established malice and appellant's sufficiency argument is without merit.

In her third and final issue, appellant contends that her sentence is manifestly excessive. This issue was not raised in appellant's concise statement of matters complained of on appeal; consequently, it is waived. Pa.R.A.P., Rule 1925(b)(4)(vii), 42 Pa.C.S.A.

Accordingly, having found no merit in the issues on appeal, we will affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/22/2014